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In The

Supreme Court of the United States

October Term, 1979

No. 79-1744

RGP, Inc., Travelers Insurance Company, and Otis Peterson,

Petitioners,

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Darrell L., Harold, Harold M. and Luea Sorenson, Harold Jackson, State of Iowa, State Conservation Commission of the State of Iowa,

Respondents (Petitioners on Separate Petitions),

vs.

Omaha Indian Tribe and United States of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINION BELOW AND JURISDICTION

This Court previously has construed the meaning of Title 25 U. S. C. § 194 in its opinion dated June 20, 1979, but has not ruled upon the constitutionality of the said statute. *Wilson v. Omaha Indian Tribe, et al.,* 442 U. S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979).

The opinion of the Court of Appeals for the Eighth Circuit under date of January 15, 1980 on remand from the United States Supreme Court, *Omaha Indian Tribe v. Wilson, et al.*, — F. 2d —, is reproduced in the Appendix to the Petition for Writ of Certiorari filed by Roy Tibbals Wilson, et al., and for the purposes of this Petition, these petitioners will adopt that Appendix as being applicable as well to this Petition.

The Memorandum Opinion and the Findings of Fact and Conclusions of Law of the District Court for the Northern District of Iowa are reported as *United States v. Wilson,* 433 F. Supp. 57 and 67 respectively.

The First Opinion of the Court of Appeals for the Eighth Circuit, dated April 11, 1978, is reported as *Omaha Indian Tribe v. Wilson, et al.,* 575 F. 2d 620.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law. . . ."

25 U. S. C. § 194 provides:

> "*Trial of right of property; burden of proof.* In all trials about the right of property in which an Indian (construed to include an Indian Tribe or the United

States under a treaty with an Indian Tribe) may be a party on one side, and a white person (construed to mean a non-Indian except the sovereign States of the Union) on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

———o———

QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals erred in its construction of 25 U. S. C. § 194 by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process; whether 25 U. S. C. § 194 as construed by the United States Supreme Court and the Eighth Circuit Court of Appeals unconstitutionally creates an irrational racial classification and imposes racial and ethnic burdens and preferences in violation of the Fifth Amendment to the Constitution.

———o———

STATEMENT OF THE CASE

This case is a consolidation of suits, brought by the Omaha Indian Tribe and the United States as trustee for that Tribe, to quiet title to certain Iowa farm land as being part of the Omaha Indian Reservation, which was established on the Nebraska side of the Missouri River pursuant to a treaty in 1854.

The complaint of the Tribe invoked the jurisdiction of the District Court under 28 U. S. Code §§ 1331 and 1362. The complaint of the United States invoked the jurisdiction of the District Court under 28 U. S. Code § 1345.

The District Court found for the defendants, petitioners herein, on their counterclaims. The Eighth Circuit reversed.

This Court has previously considered 25 U. S. C. § 194 and has construed the language thereof in its opinion of June 20, 1979 in *Wilson v. Omaha Indian Tribe,* 442 U. S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979). Although a Petition for Certiorari filed by these petitioners (No. 78-162) had been filed challenging the constitutionality of § 194 as being invidiously racially discriminatory, this Court did not act upon said Petition until after its opinion was entered on June 20, 1979. Thereafter, on June 25, 1979, this Court entered the following Order in No. 78-162:

> "The Petition for a Writ of Certiorari is granted. The Judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Wilson v. Omaha Indian Tribe,* 442 U. S. — (1979)."

The Eighth Circuit Court of Appeals in its opinion filed January 15, 1980 gave *no* consideration to the question of the constitutionality of 25 U. S. C. § 194, stating simply that:

> "Generally, the Court sustained our holding that 25 U. S. C. § 194 was applicable and placed both the burden of going forward with the evidence and of persuasion upon the defendants. . . ." (Slip Opinion, Page 3; App. pp. 33-34).

Therefore, even though this Court has heretofore granted the Petition for Writ of Certiorari to these petitioners for the purpose of testing the constitutionality of § 194, the Court of Appeals has ignored that mandate and refused to consider the various serious constitutional problems presented by the statute as construed.

The Court of Appeals, applying 25 U. S. C. § 194 in its opinion filed January 15, 1980, held that the defendants (petitioners here) had failed to meet their burden of proof when it said:

> "Particularly in light of the requirement that defendants, *because of the presumption applicable under 25 U. S. C. § 194,* succeed on the strength of their own case and not any weakness on their opponents' claim to title, we conclude they failed to meet their burden of proof. . . ." (Slip Opinion, Page 15; App. pp. 46-47). (Emphasis ours.)

It is readily apparent from the preceding quote that the Court of Appeals required the defendants to sustain their burden of persuasion by something more than a preponderance of evidence, i. e., that § 194 does not permit consideration of the weakness of the plaintiffs' (respondents' here) proof of avulsion. Alternatively, it is obvious that if 25 U. S. C. § 194 is unconstitutional, then the burden of proof will not shift and the posture of the evidence and thereby the disposition of the case will change dramatically.

———o———

REASONS FOR GRANTING THE WRIT AND ARGUMENT

A preponderance of evidence meets the burden of proof.

The presumption created by the statute as construed bears no "rational connection" between the fact of previous ownership in 1867 and the presumed continuity of that ownership for the 100 years thereafter. Such a "rational connection" is required to comply with due process in civil cases. *Tot v. United States,* 319 U. S. 463 (1943); *Western and Atlantic R. R. Co. v. Henderson,* 279 U. S. 639, 642. Moreover, a statutory presumption such as this cannot "deny a fair opportunity to repel it"; *Western and Atlantic R. R. Co. v. Henderson,* supra; create "an invidious discrimination", *Bandini Petroleum Co. v. Superior Court,* 284 U. S. 8, 19 (1931); or be "conclusive of the rights of the party." *Hawkins v. Bleakley,* 243 U. S. 210, 214 (1917); *Valdis v. Kline,* 412 U. S. 441 (1973). The statute as presently construed in relationship to these petitioners does all of the prohibited things detailed above. Even the Eighth Circuit Court of Appeals acknowledges that the presumption, as applied to this case, becomes irrebuttable and conclusive as against these petitioners, thereby denying them the fair opportunity to repel it.[1]

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1 In its First Opinion, the Eighth Circuit Court of Appeals acknowledged: "We recognize that to require the defendants (petitioners here) to prove the cause of the river's movement occurring some 100 years after the event is indeed an *onerous burden.* This may seem to be an injustice when one considers that the defendants or their predecessors have possessed and continuously farmed the land *without protest* for nearly 40 years. . . ." (Emphasis ours.) *Omaha Indian Tribe v. Wilson, et al,* 575 F. 2d 620, 651.

On the prior appeal of this case, this Court noted that the Court of Appeals had found "the evidence was in equipoise". This Court, after examination of the record, noted that the District Court had found that the defendants had affirmatively carried the burden of proving their good title by accretion. At Page 173 of 61 L. Ed. 2d this Court noted:

> "Proceeding to adjudicate their case in accordance with Nebraska law, the district judge found that the tribe and the government, . . . had failed to prove that the Blackbird Bend area had been separated from the rest of the reservation by avulsive changes in the Missouri River and that the defendants . . . without the aid of any presumption of accretion available under Iowa law, if applicable, had instead proved that the river changes had been by accretion . . . the defendants, . . . having carried the burden of proving their good title to the land at issue, were entitled to a decree quieting title in them."
>
> ". . . It should also be noted that the District Court, although wrong in wholly rejecting the applicability of § 194, concluded as a matter of fact and law that the defendants . . . had carried the burden of persuasion normally incumbent upon a plaintiff in a quiet title action, and had proved by a preponderance of the evidence that the reservation lands had been eroded and had accreted to the Iowa shoreline. . . ."

After remand, the Court of Appeals in its second opinion held, nevertheless, that the District Court erroneously applied the burden of proof, asserting that it had not found the evidence to be in "equipoise" but rather that the ". . . defendants failed to meet their burden. . . ." (Slip Opinion Page 4, Footnote 2) (App. p. 35). However, the Court of Appeals elsewhere recognized that the defend-

ants' proof was stronger than that of the plaintiffs when it stated:

> ". . . evidence supporting the possibility of avulsive chute channels or a neck cut-off does not equally balance defendants' proof, but rather points to the speculative and conjectural nature of any conclusions drawn from the evidence. . . ." (Slip Opinion pp. 14-15; App. p. 46).

Ostensibly applying the preponderance of evidence test used by the District Court and implicitly held proper by this Court in *Wilson,* the Court of Appeals then erred in measuring the proof required to establish accretion. First, it misconstrued the District Court's placement of burden of proof by stating:

> "We also held the District Court erroneously placed the burden of proof on the Tribe, although it did not give the defendants the benefit of a presumption of accretion. *Id.* at 633. The result was that defendants received the benefit of any favorable inferences from sketchy proof of avulsion: what was not clearly proved avulsive must, in the District Court's view, be the result of accretion.
>
> "The Supreme Court's decision makes it clear that defendants shoulder the burden of persuasion on the question of whether the Tribe is no longer entitled to possession of the area which was in the past part of its reservation. To quiet title in themselves, defendants must show the strength of their title; they must prove by a preponderance of the evidence that the river changed by the process called accretion. Thus, they do not have the advantage, as they did under the Trial Court's reasoning, of inferences drawn from any weaknesses in evidence tending to show avulsion." (Slip Opinion pp. 4-5; App. pp. 35-36).

This fails to recognize, as this Court did in *Wilson,* that the District Court required the defendants to affirmatively

prove their counterclaim to quiet title, as required by Nebraska law.

It is apparent that the Court of Appeals construed 25 U. S. C. § 194 as imposing more than a preponderance of the evidence standard. Instead the Court of Appeals construes § 194 as a presumption which somehow precludes consideration of the weakness of evidence supporting the Indians' theory that an avulsion occurred (Slip Opinion p. 15; pp. 4-5, quoted supra). Since accretion is the opposite of avulsion under Nebraska law, *Gill v. Lydick,* 40 Neb. 508, 59 N. W. 104, 105 (1894), proof that avulsion did not occur is proof of accretion and vice versa. The effect of the holding of the Court of Appeals is to preclude the District Court from considering the entire record to determine the question of ultimate fact, i. e., whether the river moved by accretion or avulsion.

Since the underlying source of law to be applied in this case is the Nebraska law, and since the significance of such factors as identifiable land in place is to be assessed in accordance with Nebraska law, Federal Courts in applying a Federal burden of proof, which is the same as that applied under Nebraska law should harmonize the proof with that required in Nebraska law. It is apparent that Nebraska courts look both to factors positively indicating that accretion occurred as well as to factors negativing avulsion in determining whether one has proven that a river moved by accretion. *Frank v. Smith,* 138 Neb. 382, 293 N. W. 330, 334 (1940) (proof river change gradual plus no rapid seeking of new bed); *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538, 541 (1943) vacating 141 Neb. 517, 4 N. W. 2d 290 (1942) (no evidence of iden-

tifiable land or carving out of new channel); *Lieneman v. Sarpy County,* 145 Neb. 382, 16 N. W. 2d 725, 730 (1944) (lack of evidence that land created by avulsion); *Mercurio v. Duncan,* 131 Neb. 767, 269 N. W. 901, 903 (1936) (study of entire record including weakness of evidence of avulsion and fact some witnesses for party claiming avulsion testified the river gradually moved). These authorities establish that a party meets the preponderance of evidence standard to establish accretion by proof of the lack of identifiable land in place. We find no federal authority, and none is cited by the Court of Appeals, for the proposition that the burden of persuasion on an issue of ultimate fact cannot be met by examination of the weakness of evidence to the contrary as well as positive evidence supporting the party's position. In fact, we believe the contrary is the rule.[2] The refusal of the Court of Appeals to accept the evidentiary standards appropriate under Nebraska law as related to this case unconstitutionally deprives these petitioners of due process of law, is confiscatory and shocks all fair sense of justice.

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2 *Ussery v. Anderson-Tully Co.,* 122 F. Supp. 115 (S. D. Tex., 1954) ". . . We should also predict that upon the occurrence of the avulsion unmistakeable and easily identifiable evidences thereof would be left upon the ground, particularly if, . . . the avulsion took place as late as the period between 1874 and 1897; we also feel that some record of such avulsion would be discernable upon existing maps and aerial mosaics. There is no such evidence, however, either on the ground or on the maps, and, on the other hand, we are satisfied that the available map evidence and the physical evidence on the ground refutes the plaintiffs' theory and establishes the validity of that of the defendant. . . ."

Irrational racial classifications, burdens and preferences.

The special admissions program of the Medical School of the University of California at Davis which was based on racial and ethnic classifications has recently been found by this Court to violate the equal protection guarantees of the Fourteenth Amendment. In so holding, in *University of California Regents v. Bakke,* 38 U. S. 265, 57 L. Ed. 2d 750, 770, 98 S. Ct. 2733, this Court said:

> "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."

Likewise, the pronouncements of this Court in *Hirabayashi v. U. S.,* 320 U. S. 81, 87 L. Ed. at 1786, 63 S. Ct. 1375 wherein it was said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

The Fifth Amendment Guaranty of due process is the primary and indispensable foundation of individual freedoms. The Fifth Amendment is a limitation upon the powers of Congress while the Fourteenth Amendment is a limitation upon the powers of the states, but both proscribe the deprivation of property without due process and the same meaning is usually given to the guaranty in both Amendments. *Paul v. Davis,* 424 U. S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155, Reh. Den. 425 U. S. 985, 48 L. Ed. 2d 811, 96 S. Ct. 2194. It has been said that the due process guaranty bars Congress from enactments that "shock the

sense of fair play." *Galvan v. Press,* 347 U. S. 522, 98 L. Ed. 911, 74 S. Ct. 737, Reh. Den. 348 U. S. 852, 99 L. Ed. 671, 75 S. Ct. 17. Therefore, due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice, and dealing neither with power nor jurisdiction, but rather with their exercise. *Kinsella v. United States,* 361 U. S. 234, 4 L. Ed. 2d 268, 80 S. Ct. 297.

The effect of the due process guaranty is to inhibit the taking of one person's property and giving it to another contrary to settled usages and modes of procedure without notice and opportunity for a hearing. *Ochoa v. Hernandez Y. Morales,* 230 U. S. 139, 57 L. Ed. 1427, 33 St. Ct. 1033. Therefore, an attempt by a statute to work such a change of ownership would be a glaring violation of the due process guaranty and could not be defended as an exercise of the police power. *Daugherty v. Thomas,* 174 Mich. 371, 140 N. W. 615. This is exactly what this statute does in relationship to these petitioners' property. Because of the passage of time and therefore the absence of eye witnesses (although Judge Prichard testified to the appearance of the "bar" land he saw in 1919 which had just recently been formed by action of the river), and because of the shift in the burden of proof due to previous "possession or ownership" the Eighth Circuit Court of Appeals has now told the petitioners that the application of the statute deprives them of their property. This is a deprivation which not only shocks the universal sense of justice and fundamental fairness, but in effect amounts to a "confiscation" of the property of the petitioners which has always been a violation of the due process clause of the Fifth Amendment. *Zschernig v. Miller,* 389 U. S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664.

This Court has previously held that the due process clause of the Fourteenth Amendment is violated if a state, although making no attempt to take accreted lands from riparian owners by eminent domain, achieves the same result by effecting a retroactive transformation of private property into public property without paying for the privilege of doing so because the due process clause forbids such confiscation by a state no less through its courts than through its legislature and no less when the taking is unintended than when it is deliberate. *Hughes v. Washington,* 389 U. S. 290, 19 L. Ed. 2d 530, 536, 88 S. Ct. 438.

The petitioners here have farmed the property in dispute since the early 1900's. They earn their livelihood from the farming of this land. It has been said that the preservation of the right to earn a livelihood is the principal purpose of the Constitution itself. *Truax v. Raich,* 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7. A person's business, occupation or calling is "property" within the meaning of the Constitutional provisions as to due process and the Constitutional guaranty of the right of property protects it not only from confiscation by legislative edicts, but also from any unjustifiable impairment or abridgment. *United States v. Robel,* 389 U. S. 258, 19 L. Ed. 2d 508, 88 S. Ct. 419. To apply this statute to these petitioners will effectively deny them the right to earn their livelihood from this property without the "Due Process" contemplated by the Fifth Amendment. It has long been the rule that legal restrictions which curtail the civil rights of a single racial group, in this instance non-Indians, except the State of Iowa, are immediately suspect and the Courts must subject them to the most rigid scrutiny. *Korematsu v. U. S.,* 323 U. S. at 216, 89

L. Ed. 194, 65 S. Ct. 193. This Court has consistently repudiated distinctions between citizens solely because of their ancestry. *Loving v. Virginia,* 388 U. S. 1, 11, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). 25 U. S. C. § 194 creates just such a distinction and must now be examined with the "rigid scrutiny" required under *Korematsu, supra.*

Perhaps an argument for constitutionality of § 194 could have been made when it was enacted in 1822. No such argument can be made today because the burden of proof on issues of accretion and avulsion is not rationally related to the protection of Indians from unfair dealing. The construction of § 194 by the Court of Appeals, in effect, establishes *a presumption of avulsion* when applied to movements of the Missouri River over 100 years ago. Since any evidence thereon is considered to be "speculative", "conjectural" and "inconclusive" the presumption becomes irrebuttable and therefore unconstitutional.

This Court recognized that the purpose of the Indian Trade and Intercourse Acts, originating in 1790, was to protect the rights of Indians to their properties and to prohibit non-Indians from settling on tribal properties. *Wilson v. Omaha Indian Tribe, supra,* at p. 164, 61 L. Ed 2d. At that time in the history of our country there were more arguable "rational distinctions" between the Indian and the non-Indian population to constitutionally sustain the legislation. Apparently, however, the fears of Congress which precipitated what is now § 194 were unfounded since no reported litigation involving § 194 occurred in the ensuing 153 years from the first passage of the statute in 1822 until this litigation in 1975. There

was apparently never any necessity for "an Indian" (even as construed) to resort to § 194 in order to prevent or prohibit settlers from the illegal occupancy of Indian territory. During that same course of time, the United States Government, through its teaties with various Indian tribes, took upon itself a trustee status regarding Indian lands, thereby becoming the protector of Indian land rights. *Heckman v. United States,* 224 U. S. 413, 56 L. Ed. 820, 32 S. Ct. 424 (1912); *Wilson v. Omaha Indian Tribe,* 61 L. Ed. 2d at p. 167; App. p. 15. By virtue of that trust status, the United States Government came under the cloak of the protection afforded by the statute. However, the original purpose for the enactment of the statute for the protection of Indians should not under any rational consideration be now applicable to the United States. To apply the presumption in § 194 to the United States as against the "non-Indian" is an application which can only be classified as capricious, arbitrary and unreasonable without rational basis in the light of its original purpose or objective. *Carrington v. Rash,* 380 U. S. 89, 13 L. Ed. 2d 675, 85 S. Ct. 775. The history of the use of the statute for the protection of the rights of Indians to their lands speaks for itself. Obviously, until applied by the Eighth Circuit in this case, there had never been a prior necessity for its use.

In the 1970's, the status of the Omaha Indian Tribe as a ward of the United States no longer needs the special protetcion regarding its land which are imposed upon the "non-Indians" by § 194 in this land title litigation. As stated by Justice Powell in *Bakke, supra,* 57 L. Ed. 2d at page 774:

> "It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." [3]

Therefore, Justice Powell continues:

> "The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgment. As observed above the 'white majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination ot the hands of the state and private individuals. . . ."

The inverse discrimination created by 25 U. S. C. § 194 is obvious on its face. The fact that the Court has construed the phrase "a white person" to mean a "non-Indian" accomplishes nothing in relationship to the racial and ethnic burdens and preferences which violate due process. The *Bakke* decision speaks to that very issue, 57 L. Ed. 2d at page 776:

> "Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise *impermissible burdens* in order to enhance the societal standing of their ethnic roots. Second, preferential programs may only re-enforce common stereotypes

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3 Professor Bickel noted the self-contradiction of that view: "The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: *discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of society.* Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others having found support in the Constitution for equality, they now claim support of inequality under the same Constitution." A. Bickel, The Morality of Consent, 133 (1975). (Emphasis supplied.)

> holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. (Citing authority). Third, *there is a measure of inequity* in forcing innocent persons in respondent's position to *bear the burden of* redressing grievances *not of their making.*" (Emphasis ours.)

The political motives in 1834 for the passage of what is now 25 U. S. C. § 194 was felt to be necessary at the time, but it bears no relationship to the realities of the 20th Century. The Federal Government as guardian of the Indian Tribes of the United States has been in such a trust relationship with the Omaha Indian Tribe since 1854. To say that the United States is unable to properly defend itself in title litigation of this kind is as ludicrous as suggesting that Mohammed Ali can't punch his way out of a paper bag.

There is presently pending in various Federal Courts extensive Indian claims litigation brought by the United States as trustee for Indians or individual Indian tribes for the recovery of land and for trespass or other damages for the wrongful possession of land.[4] When this statute is examined with "exacting scrutiny", there is neither rational reason, nor compelling governmental interest to apply it in favor of the United States or the

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4 Among the more substantial of the claims for land and damages asserted in the pending cases are *United States v. State of Maine,* Civ. No. 1966-N. D., 1969-N. D. (D. Me.) claiming approximately 12.5 million acres and an estimated $25,000,000,000 in trespass damages; *Chitimacha Tribe of Louisiana v. Harry L. Laws* Co., Civ. No. 77072-L (W. D. La.), 7,000 acres of land and $100,000,000 in damages; *Oneida Nation v. New York State Thruway Authority,* 78-CV-104 (N.D.N.Y.), approvimately 6 million acres and damages exceeding $12,000,000.

Indian tribe who obviously are quite capable of looking out for themselves without the benefit of any shifting of the burden of proof to the "non-Indians".

Quoting again from *University of California Regents v. Bakke, supra,* 57 L. Ed. 2d at page 777:

> ". . . When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve *a compelling governmental interest.* . . ." (Emphasis ours).

There is simply no compelling governmental interest which can be shown to uphold the constitutionality of this statute. The government was ably and vigorously represented by members of its Justice Department throughout the entire proceedings. The Omaha Indian Tribe was likewise ably and vigorously represented by retained counsel paid by the BIA, who has many years background as a water rights specialist for the BIA. Both the Government and the Tribe had the checkbook of the U. S. Treasury at its disposal.[5] A close scrutiny of the statute reveals such an obvious racial and ethnic burden on the petitioners herein as to constitute an irrational racial classification violative of due process.

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5 The record shows that the BIA paid Elmer Clark, its investigator-surveyor, and V. T. N. Colorado, Inc., the successor to Clark's surveying business, for their work and that of Charles Robinson, a geologist, and his associates, in preparation of these cases for trial, more that $250,000.00 (R. 661). In addition to that, they were paid for their attendance and testimony at trial. The BIA paid Raul McQuivey, a hydrologist, for his preparation for trial and testimony, $75,000.00 (R. 1655). Services of Veeder and Corke as BIA employees supervising the investigation were supplied the Tribe by the BIA as were fees for counsel for the Tribe.

The Eighth Circuit sanctioned § 194 citing as authority the decision in *Morton v. Mancari*, 417 U. S. 535, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974). *Omaha Indian Tribe v. Wilson, et al.*, 575 F. 2d at Page 631, Footnote 18. The *Morton* case was cited for the proposition that legislation has been upheld that singles out Indians for particular and "special treatment". However, *Morton* does not hinge upon a constitutional question, but instead, this Court found that the preference was not racial at all, but rather "*an employment criterion* reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion". (Emphasis ours.) Therefore, the basis upon which the Eighth Circuit Court of Appeals originally held the statute to be constitutional is likewise not a basis which will withstand the "close scrutiny" test.

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CONCLUSION

For all of the reasons heretofore stated, it is respectfully requested that this Court grant a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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